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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES E. PIETRANGELO, II,
Plaintiff-Petitioner,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE; MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY; UNITED STATES,
Defendants-Respondents,
and

THOMAS COOK; MEGAN DRESCH; LAURA GALABURDA; JACK GLOVER; DAVID HALL; MONICA HILL; JENNY LYNN KOPFSTEIN; JENNIFER MCGINN; JUSTIN PEACOCK; DEREK SPARKS; STACY VASQUEZ,
Plaintiffs-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE COOK RESPONDENTS

AARON D. TAX
EMILY HECHT
SERVICEMEMBERS LEGAL DEFENSE NETWORK
P.O. Box 65301
Washington, DC 20035

JULIAN DAVIS MORTENSON
FORDHAM LAW SCHOOL
140 West 62nd Street
New York, NY 10023

DANIEL C. RICHENTHAL
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022

PAUL R.Q. WOLFSON
Counsel of Record
CAREY BOLLINGER
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

CRAIG E. ESTES
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

QUESTION PRESENTED

Whether the court of appeals erred in sustaining dismissal of a constitutional challenge to the statutory prohibition on military service by gay persons without allowing any opportunity for development of a factual record.

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The opinion of the court of appeals (Pet. App. A1-A68) is reported at 528 F.3d 42. The opinion of the district court (Pet. App. A69-A121) is reported at 429 F. Supp. 2d 385.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2008. Petitions for rehearing were denied on August 8, 2008. On October 21 and 22, 2008, Justice Souter extended the time for filing petitions for a writ of certiorari in this case to and including January 5, 2009. The petition was filed on December 23, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Respondents Thomas Cook, Megan Dresch, Laura Galaburda, Jack Glover, David Hall, Monica Hill, Jenny Lynn Kopfstein, Jennifer McGinn, Justin Peacock, Derek Sparks, and Stacy Vasquez (the Cook respondents) are gay, lesbian, or bisexual Americans who, like petitioner Pietrangelo, served honorably in the Armed Forces, in the Middle East and elsewhere.[1] Like petitioner and thousands of others, all were discharged from the military under the so-called "Don't Ask, Don't Tell" (DADT) statute, 10 U.S.C. § 654.

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[1] The petition alludes to the Cook respondents only in passing. Pet. 1 n.1. As described here and below, however, they were "parties to the proceeding in the court whose judgment is sought to be reviewed." S. Ct. R. 12.6. They are accordingly also "parties entitled to file documents in this Court." *Id.*

Petitioner and the eleven Cook respondents originally filed a single complaint challenging the constitutionality of DADT, on its face and as applied to them. The district court dismissed the complaint for failure to state a claim, without allowing any opportunity for discovery or the compilation of a factual record. Petitioner seeks review of the First Circuit's decision affirming that decision.

The Cook respondents agree that the court of appeals erred; that DADT is not only bad policy but violates, on its face and as applied, the constitutional rights of gay, lesbian, and bisexual Americans; and that the issues at the heart of this case may at some point require resolution by this Court. If the Court grants review in this case, the Cook respondents will support reversal of the judgment below. Unlike petitioner, however, the Cook respondents believe the Court would be better advised to defer review at this time.

As the Cook respondents have repeatedly argued, proper consideration of the constitutionality of DADT, particularly as applied to specific individuals, requires the development of an appropriate factual record. A recent decision by the Ninth Circuit, remanding an individual DADT challenge for further proceedings, provides a ready vehicle for the development of such a record. *See Witt* v. *Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008). Moreover, changes in public and military opinion on the policy judgment reflected in the DADT statute, substantial support for a bill to repeal the statute introduced in the last Congress, and the results of the recent national elections raise the possibility of legislative action that may eliminate any need for this Court to address the constitutionality of the present statute. Under these circumstances, the

Cook respondents believe that review of the present case would be premature.

STATEMENT

1. The DADT statute, enacted in 1993, codifies an effective ban on military service by gay persons. 10 U.S.C. § 654; National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1670 (1993).[2] Under the statute and its extensive implementing regulations, a service member "shall be separated" from the Armed Forces if he or she has (i) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts"; (ii) "stated that he or she is a homosexual or bisexual, or words to that effect"; or (iii) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(1)-(3).

The first two grounds for separation are theoretically subject to exceptions, but only if the service member demonstrates that, despite a particular act or statement, he or she actually "is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." § 654(b)(2); *see* § 654(b)(1)(E); *see also, e.g.*, Department of Defense Instruction 1332.14, "Enlisted Administrative Separations," Enclosure 3(8)(a)(1) (Aug. 28, 2008) ("Homosexual conduct includes homosexual acts, a statement by a Service member that demonstrates a propensity or intent to engage in homosexual acts, or a

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[2] This brief sometimes uses the term "gay" as shorthand for gay, lesbian, or bisexual.

homosexual marriage or attempted marriage.").[3] In practice, it is impossible for a gay service member to make that showing.[4] The recurrent "propensity or intent" language reflects the statute's stated premise that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." § 654(a)(15).[5]

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[3] "[H]omosexual act" is defined to include not only "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires," but even "(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." § 654(f)(3).

[4] In the early years of DADT, one Navy Reserve Lieutenant convinced a separation board that mere acknowledgement of her sexual orientation did not justify an inference that she had a propensity or intent to engage in homosexual acts. The Defense Department promptly issued additional guidance, forcefully clarifying that, for example, "[a] member may not avoid the burden of rebutting the presumption [that a person who acknowledges he or she is gay also "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," thus requiring separation] merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation, ... and not to convey any message about propensity or intent to engage in homosexual acts." Memorandum from Judith Miller, General Counsel, DoD, to General Counsels of the Military Departments *et al.*, at 2 (Aug. 18, 1995). Since then, no service member who has made a "statement" covered by DADT has succeeded in rebutting the presumption that he or she has at least the "intent" or "propensity" to engage in prohibited acts.

[5] Many supporters of DADT were less careful with their language. They argued, for example, that permitting military service

Despite its popular name, the DADT statute contains no "Don't Ask" guarantee.[6] The "Don't Tell" prohibition, in contrast, is robust, covering any honest admission by a gay service member regarding his or her sexual orientation to anyone, in any context. *See* § 654(b)(2). (Discussions with medical providers, chaplains, or family members, for example, are not privileged in this respect.) Basic personal conversations of the sort well-meaning friends and colleagues engage in every day require gay service members, unlike their straight counterparts, to speak creatively, disingenuously, or not at all in order to avoid making any statement that might be construed as "demonstrat[ing] ... a propensity to engage in, or inten[t] to engage in homosexual acts" (§ 654(b)(2)). The law requires not just discretion, but both complete abstinence and absolute silence, or even dishonesty, with respect to a fundamental aspect of gay service members' personal human identity.

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by gay persons would legitimize "a homosexual lifestyle when the homosexual act is an unnatural act and one that is prohibited by law," and that gay service members could not be trusted and were "deviant" and "indecent." *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the H. Comm. on Armed Services*, 103d Cong. 3 (1993) (statement of Rep. Floyd Spence); *id.* at 89-90, 92 (statement of Col. John Ripley).

[6] While the regulations purport to provide some restrictions on the initiation of investigations, their protection is weak at best. Critically, the regulations impose no limit on the use of information obtained from improper investigations. *See, e.g.*, DoD Instr. 1332.14, Encl. 5(3)(c) (Aug. 28, 2008) ("Nothing in this provision ... provide[s] the Service member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the Service member, in any proceeding.").

2. a. Petitioner and the eleven Cook respondents were all forced to leave the military, against their will and despite exemplary records, because of DADT. In 2004 they jointly filed the complaint in this case, raising due process, free speech, and equal protection challenges to the constitutionality of the statute, both on its face and as applied. They acknowledged that courts had previously sustained the statute, largely on the strength of this Court's decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), which had upheld a statute that criminalized even private consensual homosexual conduct. They argued, however, that at least two later developments justified revisiting the question.

First, in 2003 this Court decided *Lawrence* v. *Texas*, 539 U.S. 558 (2003), which overruled *Bowers* and recognized that the constitutional right to privacy encompasses a liberty interest in private adult consensual intimacy and relationships. All of the courts that had upheld DADT before *Lawrence* relied upon *Bowers* or circuit precedent based on *Bowers*.

Second, even more evidence, including the wartime experience of the Armed Forces themselves, had developed to show that the factual premise of DADT is simply false. For example, the complaint alleged that service members known to be gay, lesbian, or bisexual had served with distinction in Kosovo, Afghanistan, Iraq, and elsewhere, with no basis for claiming that their presence harmed morale, good order and discipline, or unit cohesion. Compl. ¶ 46.

b. The district court dismissed the complaint for failure to state a claim. Pet. App. A69-A121. It concluded that *Lawrence* did not alter the "rational basis" standard of review for due process or equal protection challenges to DADT (Pet. App. A89-A90, A92-A93),

and that the statute satisfied that standard as a matter of law (*id.* at A93-A114, A120). It further held that DADT did not violate gay service members' First Amendment rights because it involved only an "evidentiary use of statements by a person to prove that person's intent." *Id.* at A116. The court dismissed the complaint without giving petitioner or the Cook respondents any opportunity to conduct discovery or otherwise establish a factual record to support their constitutional claims, in part because it did not understand them to be advancing genuine as-applied claims. *See id.* at A79.

c. The court of appeals affirmed. Pet. App. A1-A68.[7] Unlike the district court, it concluded that *Lawrence* required the application of a form of heightened scrutiny. *Id.* at A27-A28. Defining the protected interest recognized by *Lawrence* as one "for adults to engage in consensual sexual intimacy in the home" (*id.* at A26), it held that a court must "focus[] on the individual's liberty interest" (*id.*) and then "balance[] the strength of the state's asserted interest ... against the degree of intrusion into" that protected individual interest (*id.* at A28). The court of appeals also understood that the complaint here included "classic as-applied challenges." *Id.* at A30 n.8. Nonetheless, it agreed that the complaint should be dismissed without

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[7] In the district court, all plaintiffs were initially represented by the same counsel. After the district court dismissed the case, petitioner Pietrangelo opted to represent himself and filed a separate notice of appeal. The court of appeals consolidated petitioner's appeal and that of the Cook respondents for purposes of briefing and argument, and treated the two together in its decision.

any opportunity for factual development. *E.g.*, *id.* at A37.

Focusing on the military context of DADT (Pet. App. A30-A33) and the circumstances of its enactment (*id.* at A33-A36), the court concluded that it was required to take "at face value" (*id.* at A36) Congress's articulated interest in avoiding a purported threat to "'high morale, good order and discipline, and unit cohesion'" (*id.*). The court then upheld dismissal of the plaintiffs' due process challenge—without any inquiry into the factual validity of the asserted governmental interest, without any assessment or balancing of the countervailing intrusion into the individual liberty interests protected by *Lawrence*, and without any tailoring analysis. It merely announced, without further discussion, that "where Congress has articulated a substantial government interest for a law, and where the challenges in question implicate that interest, judicial intrusion is simply not warranted." *Id.* at A37.

The court also upheld dismissal of the plaintiffs' equal protection and free speech claims. It held that the equal protection claims were subject only to rational-basis review (Pet. App. A38-A41), and that the statute's burdens on speech did not violate the First Amendment because their purpose was "not to restrict ... speech" but "to identify those who have engaged or are likely to engage in a homosexual act" (*id.* at A42; *see id.* at A41-A49). Judge Saris would have reversed dismissal as to the free speech claim. *Id.* at A49-A68.

ARGUMENT

1. The Cook respondents agree with petitioner that the court of appeals erred in sustaining dismissal of the complaint in this case. Even "in the area of military affairs ... Congress remains subject to the limita-

tions of the Due Process Clause." *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981). The present DADT statute and regulations are unconstitutional for all the reasons advanced in the original complaint, and the plaintiffs here should have been given the chance to make their case.

The DADT statute burdens gay service members' fundamental liberty interests in maintaining intimate personal relationships consistent with their innate identity, including (but certainly not limited to) engaging in private adult consensual intimate conduct. It denies gay service members treatment equal to that received by their heterosexual colleagues. It suppresses or penalizes expression by gay service members regarding some of the most commonplace and yet centrally important aspects of their personal identities. And these burdens are not remotely justified by any actual relationship to any compelling, important, or even legitimate governmental interest.

The statute is as unconstitutional as it is baseless and unjust. The court of appeals erred in sustaining it, and especially in doing so without allowing the plaintiffs any opportunity to build a concrete factual record to support their constitutional claims. The issues raised by the case are important, and ultimately some or all of them may well require resolution by this Court. If the Court grants review in this case, the Cook respondents will vigorously support reversal of the judgment below.

2. Nonetheless, for several reasons the Cook respondents have not sought review in this case.

a. First, while there is much to criticize in the opinions below, one central error was the courts' refusal to afford the plaintiffs any opportunity to build a factual

record.[8] Because of that error, in reviewing this case the Court would be asked to consider the important constitutional questions that petitioner seeks to present without the benefit of the very record that the Cook respondents have maintained is necessary to proper adjudication of their challenge to the DADT statute.

b. Second, while there is some uncertainty in the lower courts over how to interpret this Court's decision in *Lawrence* (*see* Pet. 24-26), that by itself is not a basis for review in this case. In particular, most cases do not involve the military context, in which the government argues it is entitled to exceptional deference. In the specific context of the DADT statute, there is no conflict warranting immediate review.

In the DADT context, as petitioner points out (Pet. 26), the Ninth Circuit also recently held that a form of heightened scrutiny applies after *Lawrence*. *Witt* v. *Department of Air Force*, 527 F.3d 806, 817-819 (9th Cir.), *reh'g denied*, 548 F.3d 1264 (2008). The *Witt* court articulated a constitutional test somewhat more specifically than the First Circuit in this case. *Compare* Pet. App. A28 ("balance[] the strength of the state's asserted interest ... against the degree of intrusion into the petitioners' private sexual life") *with* 527 F.3d at 819 ("the government must advance an important gov-

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[8] Even before *Lawrence*, courts considering challenges to the DADT statute allowed plaintiffs to develop at least some factual record. *See, e.g.*, *Able* v. *United States*, 88 F.3d 1280, 1288, 1291-1292 (2d Cir. 1996) (noting that district court held four-day trial on one issue and remanding for further trial of improperly dismissed claim). It is ironic that this case, coming after *Lawrence*, is the first to have been finally resolved on a motion to dismiss.

ernmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest"). While acknowledging the importance of the military context, in practice it gave that context less sweeping and automatic deference than the First Circuit accorded it in this case. *Compare* Pet. App. A36, A37 n.10 *with* 527 F.3d at 821. Most important, it made clear that analysis of the constitutional challenge should be "as-applied rather than facial" (527 F.3d at 819), and remanded the case for development of a factual record (*id.* at 821).

The Ninth Circuit has not held the DADT statute unconstitutional, even as applied to Major Witt. While the Cook respondents expect that exploration of the facts on remand will lead to that conclusion, there is no reason for this Court to grant review in the present case on the basis of any such assumption. The more usual course would be to await the outcome of the further proceedings that have been ordered in *Witt*.[9] If the losing party ultimately seeks review of a future appellate decision invalidating or sustaining application of the statute to Major Witt, the Court will have ample opportunity to consider granting review in a case that should present the relevant issues in light of a fully-developed record.

c. Finally, it would be appropriate for the Court to postpone review at this time given the present expectation that Congress and the President will be initiating their own reexamination of the DADT statute.

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[9] Another case, *Log Cabin Republicans* v. *United States*, No. CV04-8425, is pending in the Central District of California. That litigation is presently stayed in light of *Witt*. *See* Dkt. No. 73, Joint Status Report (Jan. 21, 2009).

In the fifteen years since Congress enacted the statute, evidence that it is baseless and unjust has continued to accumulate, and the policy debate has continued to evolve. In that time, for example, service members known by their units to be gay have served our country with distinction in Kosovo, Afghanistan, Iraq, and elsewhere, without prejudice to good order, unit cohesion, or morale. Retired senior officers and straight service members are increasingly supporting an end to the DADT ban, precisely because they have concluded that morale and unit cohesion do *not* suffer from the presence of service members who are known to be gay.[10] General public opinion has shifted dramatically against the ban since 1993.[11] Calls for reevalu-

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[10] *See, e.g., Retired Top Military Officers Call For Repeal of 'Don't Ask, Don't Tell' Policy*, Jurist, Nov. 18, 2008 (statement signed by over 100 retired U.S. generals and admirals concluding that "repealing the 'don't ask, don't tell' policy would not harm and would indeed help our armed forces. As is the case with Great Britain, Israel, and other nations that allow gays and lesbians to serve openly, our service members are professionals who are able to work together effectively despite differences in race, gender, religion, and sexuality. Such collaboration reflects the strength and the best traditions of our democracy."), *available at* http://jurist.law.pitt.edu/paperchase/2008/11/retired-top-military-officers-call-for.php; John M. Shalikashvili, *Second Thoughts on Gays in the Military*, N.Y. Times, Jan. 2, 2007, at A17 (former Chairman of Joint Chiefs has concluded that gay service members "would not undermine the efficacy of the armed forces"); Matthew B. Stannard, *Obama will end 'don't ask' rule, spokesman says*, S.F. Chron., Jan. 14, 2009, at A1 (reporting results of military polls and quoting Iraq veteran and American Legion officer: "Who ... cares? Seriously.").

[11] *See, e.g.*, Stannard ("An ABC poll in July [2008] found that three-quarters of Americans supported allowing gays and lesbians to serve openly in the military compared to 44 percent of Americans who expressed the same support in 1993[.]").

ation or repeal have come from some leaders who originally supported enactment of the DADT statute, and from others not known for their support of gay causes.[12] A House bill to repeal the DADT statute garnered 149 co-sponsors in the last Congress.[13] Most recently, a new President has expressly supported repeal of DADT and said that he will work with Congress and military leaders to achieve that goal.[14]

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[12] Bob Barr, *Don't Ask, Who Cares*, Wall St. J., June 13, 2007, at A18 ("As a conservative Republican member of Congress from 1995 to 2003, I was hardly a card-carrying member of the gay-rights lobby. I opposed then, and continue to oppose, same-sex marriage, or the designation of gays as a constitutionally protected minority class. Service in the armed forces is another matter. The bottom line here is that, with nearly a decade and a half of the hybrid 'don't ask, don't tell' policy to guide us, I have become deeply impressed with the growing weight of credible military opinion which concludes that allowing gays to serve openly in the military does not pose insurmountable problems for the good order and discipline of the services."); Interview with Colin Powell, CNN, Dec. 14, 2008, Tr. 121401CN.V18 ("But it's been 15 years, and attitudes have changed. And so, I think it is time for the Congress, since it is their law, to have a full review of it."); Jim Galloway, *Ex-Senator Urges Review of Gays-In-Military Policy*, Atlanta J. & Const., June 4, 2008, at 3A (reporting statement by former Senator Sam Nunn that " 'I think [when] 15 years go by on any personnel policy, it's appropriate to take another look at it—see how it's working, ask the hard questions, hear from the military.' ").

[13] Military Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong. (2007).

[14] *See* White House Agenda on Civil Rights, *available at* http://www.whitehouse.gov/agenda/civil_rights/ (last visited Jan. 23, 2009) ("President Obama agrees with former Chairman of the Joint Chiefs of Staff John Shalikashvili and other military experts that we need to repeal the 'don't ask, don't tell' policy. The key test for military service should be patriotism, a sense of duty, and a willingness to serve. Discrimination should be prohibited. ...

These special circumstances suggest a likelihood that Congress and the President will be initiating their own reexaminations of the DADT statute in the relatively near future, and raise the possibility of legislative action that might eliminate any need for this Court to address the constitutionality of the present statute. In light of that possibility, and in the absence of any compelling need for prompt action, the Cook respondents suggest that immediate review of the sensitive substantive and procedural issues raised by this case would be premature. *Cf. Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari) ("Wise adjudication has its own time for ripening.").

CONCLUSION

Although the decision of the court of appeals is erroneous, the Cook respondents do not seek this Court's review in this case. If review is granted, the Cook respondents will support reversal of the judgment below.

The President will work with military leaders to repeal the current policy and ensure it helps accomplish our national defense goals."); *see also* Stannard ("Obama spokesman Robert Gibbs, responding ... to a Michigan resident who asked if the new administration planned to get rid of the policy, said: 'You don't hear politicians give a one-word answer much. But it's "Yes." ' ").

Respectfully submitted.

AARON D. TAX
EMILY HECHT
SERVICEMEMBERS LEGAL DEFENSE NETWORK
P.O. Box 65301
Washington, DC 20035

JULIAN DAVIS MORTENSON
140 West 62nd Street
New York, NY 10023

DANIEL C. RICHENTHAL
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022

PAUL R.Q. WOLFSON
Counsel of Record
CAREY BOLLINGER
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

CRAIG E. ESTES
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

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